NO. 35159-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NORMA ACOSTA & GILBERT ACOSTA, individually and the marital community comprised thereof,

Appellants

V.

THE CITY OF MABTON, a municipal corporation,

Respondent.

REPLY BRIEF OF APPELLANTS

KROONTJE LAW OFFICE, PLLC
Maury A. Kroontje, WSBA No 22958
Kaya R. Lurie, WSBA No. 51419
1411 Fourth Avenue, Suite 1330
Seattle, WA 98101
Phone: (206) 624-6212
Fax: (206) 624-6816
Email: maury@kroontje.net
Email: kaya@kroontje.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Regulations and Rules

I. ARGUMENT

The deposition testimony of former City of Mabton employees and Susan Evans and the expert reports of Susan Evans support the Acosta's negligence claim and present genuine issues of material fact that prevent the summary adjudication of the Acosta's claim for negligence. The Acostas provided sufficient evidence (1) regarding breach and causation to prevent summary judgment; and (2) rebutting the City of Mabton's summary judgment evidence. Furthermore, the trial court correctly denied the City of Mabton's Motion to Strike.

A. The Acostas provided sufficient summary judgment evidence on breach and causation.

In this case, a reasonable jury could find that the City of Mabton breached its duty owed to the Acostas by failing to maintain and inspect its sewer system, causing the Acosta's damages.

1. Standard of Care

In this case, the Acostas presented three sources for the City of Mabton's standard of care: (1) case law requires a municipality to do more than responsive cleaning and repair work; (2) Ms. Susan Evans, the Acosta's expert, stated in her second expert report that the City should have performed elevated cleaning and inspection of the sewer system in areas of elevated risk for backups; and (3) Ms. Evans stated during her

deposition that the standard of care for cleaning a sewer system is once to twice a year with an approved cleaning method, which includes jet rodding. CP 203, 268–69

a. Case Law: A municipality must do more than responsive maintenance on its sewer system.

A municipality has a duty to exercise reasonable care in the repair and maintenance of municipal sewage systems. *Kempter v. City of Soap Lake*, 132 Wn. App. 155, 158, 130 P.3d 420 (2006).

A municipality's "'duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed.'" *Vitucci Importing Co. v. City of Seattle*, 72 Wash. 192, 195, 130 P. 109 (1913) (citing *Vanderslice v. Philadelphia*, 103 Pa. 102, 107 (1883)). "'**Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the city liable.**'" *Id.* at 196 (citing *Vanderslice*, 103 Pa. at 107) (emphasis added).

The City of Mabton ignored this case law in its brief and presented

no evidence that it was doing more than responsive cleaning and maintenance work on its sewer system. The Acostas provided factual testimony—summarized in Section A.2. below—from former City of Mabton employees that the City of Mabton was only doing responsive maintenance work on its sewer system at the time of the sewer backup in this case and the year or two leading up to it. Thus, a reasonable person could find that the City of Mabton breached this duty of care.

b. Ms. Evans's Expert Report: A municipality should perform elevated cleaning and inspection of sections of the sewer system that are at a greater risk for backups.

In this case, Ms. Evans opined that it was a part of the City of Mabton's standard of care to perform elevated cleaning and inspection of its sewer system in areas of elevated risk for backups. In her second expert report, Ms. Evans concluded on a more probable than not basis the following:

(1) The City of Mabton knew of a history of backups in the sanitary sewer line in front of the Acosta residence prior to the January 12, 2015 sewage backup into the Acosta residence and did not take corrective measures before that time.
(2) With the knowledge of a history of backups, the City of Mabton should have considered upgrades to the sewer lines, including the portion in front of the Acosta residence prior to plans dated 2016.
(3) The City of Mabton knew of a history of grease that contributed to backups in the portion of B Street in front of the Acosta residence and did not take corrective measures…

(4) The City of Mabton maintenance of the sanitary sewer piping is below standard guidelines for maintenance. The City should have been performing elevated cleaning and inspection in areas of elevated risk and known backups including the sewer line in front of the Acosta residence.

CP 203.

Similar to how the City of Mabton ignored the case law regarding a municipality's standard of care stated in the previous section, the City largely ignored Ms. Evans's opinion that a municipality must perform elevated maintenance—cleaning and inspection—of areas of the sewer system that are at a higher risk for backups. The City provided no evidence that it was performing elevated cleaning and inspection of areas of its sewer system that are at a higher risk for backups, particularly the section of the sewer near the Acosta's home. The Acostas provided factual testimony, summarized in Section A.2. below, from former City of Mabton employees that the City of Mabton was only doing responsive maintenance work—thus not elevated inspection and cleaning of high risk areas—on its sewer system at the time of the sewer backup in this case and the year or two leading up to it. Thus, a reasonable person could find that the City of Mabton breached this duty of care.

c. Ms. Evans's Deposition Testimony: A municipality should clean the entire sewer system once to twice a year.

Ms. Evans opined that the standard of care required for

cleaning the sewer system is cleaning the entire sewer system once to twice a year with some approved cleaning method—jet rodding being one of those approved methods:

> Q. Okay. On the aspect of the case regarding cleaning, is it your opinion that the standard of care required twice-per-year jet-rodding?
> A. Once to twice a year.
> Q. That's why I asked the question.
> A. One to two times a year.
> Q. One to two times per year of the entire system; is that correct?
> A. Yes.
> Q. And that's jet-rodding specifically.
> A. It's cleaning, and the method that Mabton was using was jet-rodding.

CP 268–69.

> Q. Are there other specific aspects of Mabton's role that in your opinion led to this backup that fell below the standard of care?
> A. In addition to all of the other components we've already talked about?
> Q. Well, that's what I want to know. I mean, you've talked about a number of components. Those, I think we -- I think your testimony was those contributed to the backup. I'm trying to understand, now, something slightly different. What are the specific aspects that caused the backup for which Mabton is responsible and for which Mabton fell below the standard of care? If they're the same, then you can say they're the same, but I just need to understand that
> A. They're the same.

CP 269–70.

Mr. Peacock dismisses Ms. Evans's opinion because he is "unaware of any industry standard supporting Ms. Evans' testimony in

this regard" and he is "unaware of any municipalities that clean their entire wastewater system two times per year." CP 114. Mr. Peacock goes on to state that "[s]ewer system maintenance programs are driven by sewer infrastructure and municipal resources. Resources expended on cleaning sewer lines that do not need to be cleaned can (and should) be spent in other ways." CP 114–15. Mr. Peacock does not state what type of maintenance program the City of Mabton should have had based on its sewer infrastructure; rather, he states that he is not aware of any municipality that cleans their entire wastewater system two times per year.

However, Mr. Trujillo stated numerous times during his deposition that jet rodding of the entire sewer system once to twice a year was Mabton's standard practice until Mr. Martinez became mayor. CP 297-98. Mr. Martinez stated that this jet rodding should have been done based on Mabton's sewer needs:

> Q. How often would you do jetting or cleaning out of the sewer lines?
> A. Well, we used to do it, years ago, before we got another boss, that's Mario, we used to do it twice or once a year. I'm talking about four years ago we were pretty much still doing that and I did that for, like, eight, nine years, because I worked with the other guys and that's how they were doing it.
> But things change, so we weren't doing it twice, we had other projects, so he was focusing on other stuff. So that kind of eliminated us jet rodding pretty much the whole town yearly, you know. But yeah, we used to focus on at least do it once a year, the whole town.

Q. Okay. When did Mr. Martinez become mayor?
A. I really probably would say like three years ago.
***
Q. What did Mr. Martinez change?
A. **Well, he was trying to focus on many other stuff, cleaning weeds, town, and stuff, but, you know, basically things that we knew we had to do, they were pretty much putting aside.**

CP 297–98 (emphasis added).

Q. And is there anything that the City does to prevent the grease from causing sewer backups?
A. Well, years ago there was chemicals we used to throw, they used to call it Fireball or Heatball, something like that, that that kind of, it, you throw it in there and it melts the grease so it let's the grease go further towards the sewer plant. It takes some time. It breaks it up. But they haven't, I don't think they have been doing that for a few years.
Q. Do you remember when they stopped doing that?
A. I would say three years ago, maybe, three or four years ago.

CP 326–27.

Q. Were there procedures or requirements for you to jet rod the areas of the sewer lines where grease was prone to discharge?
A. … Years ago when I started there, it was Tury and Frank Tijerina, they were there for years, they showed me to pretty much jet rod once or twice a year the whole system. So that's what we were doing. But it kind of got stopped, I would say, two, three years ago to do the whole town. I mean, we did jet rod, but it was here and there.
…
Q. **So would jet rodding be the only way that you would clean the sewer systems?**
A. **Yeah. Well, like I said, it did help a lot. I mean, we weren't getting much plugs, or major big plugs**

like that.

Q. When you were jet rodding the whole system?
A. Right.
Q. Okay.
A. And throwing that Fireball. I mean, that did help a lot, it melted a lot of the grease and, you know, made it go all of the way towards the sewer plant and didn't stick on the sewer lines.

CP 328–29 (emphasis added).

A. Well, they wanted to catch the grease. They want to show what was in our line, on our system. And that's why we used to focus on jet rodding once or twice a year. I liked jet rodding, pretty much I would like jet rodding from September, October, and November, because that's when the grease was building up and broke it through.
Next time we used to try to jet rod was, I would say it was March, April, and May, there was times that we would try to clean that out. **But there was changes. So at least we would try to do it once a year and then all of a sudden we kind of didn't do it for, like, at least a year or so. And I think that's what caught it. And I'm pretty sure if you go back in there and you look at the lines and you'll catch a lot of grease, because I don't think they were jet rodding at the time. I don't think they have the time to do it. And they're focusing on different stuff instead of doing maintenance, what they should be doing, obviously.**

CP 316–17 (emphasis added).

Mr. Trujillo's testimony about the need to jet rod once to twice a year based on Mabton's sewer system and the behavior of grease in the sewer lines during the colder months is not inconsistent with Mr. Peacock's opinion that sewer system maintenance programs are driven by sewer infrastructure.

2. *The City of Mabton breached its duty, causing the sewer backup to occur, thereby causing the Acosta's damages.*

The Acostas set forth sufficient evidence of breach and causation based on the factual testimony and evidence of Ms. Evans and former City of Mabton employees. The City of Mabton incorrectly dismisses the Acosta's evidence of breach without meaningfully addressing the standards of care outlined above and the factual testimony from the former City of Mabton employees regarding the lack of any preventative maintenance work. The causal connection between the City of Mabton's breach and the Acosta's damages is not so speculative that reasonable minds could not differ. Genuine issues of material fact as to breach and causation remain because a reasonable person could find that the City of Mabton breached its duty, causing the sewer to back up into the Acosta's home, thereby causing the Acosta's damages.

Mr. Mendoza and Mr. Trujillo, former City of Mabton employees, have testified that a large amount of grease was in the sewer system, which caused it to back up near the Acosta's home. CP 303, 314–15, 320, 348–49, 353, 375.

This sewer backup occurred in January. CP 414–15. Mr. Trujillo testified regarding the grease contamination in the sewer lines during the fall and winter months and the necessity of jet rodding during this time:

Q. ... Do you know why this photograph was taken?
A. Well, they wanted to catch the grease. They want to show what was in our line, on our system. And that's why we used to focus on jet rodding once or twice a year. I liked jet rodding, pretty much I would like jet rodding from September, October, and November, because that's when the grease was building up and broke it through.
Next time we used to try to jet rod was, I would say it was March, April, and May, there was times that we would try to clean that out. But there was changes. So at least we would try to do it once a year and then all of a sudden we kind of didn't do it for, like, at least a year or so. And I think that's what caught it. And I'm pretty sure if you go back in there and you look at the lines and you'll catch a lot of grease, because I don't think they were jet rodding at the time. I don't think they have the time to do it. And they're focusing on different stuff instead of doing maintenance, what they should be doing, obviously.

CP 314–17.

Mayor Martinez also acknowledged the presence of grease in Mabton's sewer lines and the tendency of the sewer to back up near the Acosta's home:

> A lot of times we have grease problems. Everybody knows that. We know that when it does get backed up, it is...it ends up right there for whatever reason. That's where it ends up in the system...it's on B Street and Sixth...near Sixth Street. And that's for whatever reason where everything tends to end up and it starts to back up from there.

CP 416.

Consequently, the City of Mabton knew that it was likely that (1) grease was entering the sewer system; (2) grease coagulates during the winter

months and tends to block the lines; and (3) backups tend to occur in the sewer lines near the Acosta's home. CP 314–17, 416. As such, this backup should have been anticipated and guarded against by occasional examination and cleaning. *See Vitucci*, 72 Wash. at 194–95.

Instead, Mabton stopped the routine cleaning and inspecting of the sewer system in the year or two leading up to the January 12, 2015 backup. CP 297–98, 301, 318, 321–23, 328–29, 354–56, 362, 366–72. Rather, any cleansing of the sewer system occurred in response to reports of backups from residents. CP 367–68. This responsive cleaning did not meet Mabton's duty of care owed to the Acostas. *See Vitucci*, 72 Wash. at 195.

Because during the two years leading up to the backup on January 12, 2015, Mabton stopped any regular maintenance or jet rodding, Ms. Evans testified during her deposition that the likelihood that the sewer lines were going to back up dramatically increased. CP 261. During this time period, Ms. Evans concluded that Mabton fell below the standard of care because (1) there was a known history of backups occurring near the Acosta's home; (2) city employees were not doing routine preventative maintenance on the sewer lines, particularly those parts of the sewer lines at a higher risk for backups; (3) grease was being introduced into the sewer lines and not being controlled; and (4) just downstream of the sewer

line near the Acosta's home, the ninety degree turns caused more turbulence, restricting the ability of sewage to pass this intersection and increasing the likelihood that grease would coagulate or join other clogs in the lines. CP 257–62, 268–70. Because Mabton's conduct fell below the standard of care in maintaining its sewer lines, it breached its duty owed to the Acostas.

Ms. Evans concluded that the City of Mabton's breaches of its duty of care caused the backup to occur:

> A. You're talking about the backup into the Acosta residence?
> Q. That's the backup I'm talking about.
> A. The sewer system in front of their house backed up.
> Q. Okay. What caused it to back up?
> A. Well, at the very least, it was grease.
> Q. How do you know grease caused it to back up?
> A. It is -- was part of the Martinez, Mr. Martinez's deposition, but then also part of the Trujillo deposition and supported by photographs.
>
> ***
>
> Q. Okay. Is that your understanding of what caused the backup? That is to say, what the mayor testified to?
> MR. KROONTJE: Object to form.
> A. Well, it was certainly grease, but it was -- there was quite a number of factors. And again, all of the factors get spelled out during the course of my report.

CP 257.

> Q. You've testified that the cause of the backup at the very least was grease. You've also testified that sizing and design of the sewer in front of the residence was a role in causing the backup or played a role in causing the backup, and you mentioned the

8-inch line. Is there any other element of the design of the line that you think played a role in causing the backup?

A. Yes.

Q. Okay. What was that?

A. Downstream or immediately downstream at the immediate next intersection, there were four lines meeting at 90 degrees, three 8-inch and one 10-inch, and 90-degree els are goinc [sic] to have a lot more turbulence and restrictions on the ability of sewage to pass. And then additionally, the lack of jetting on a regular basis of the lines also contributed. I think that's the majority with, you know, subtle nuances to those items.

***

Q. Anything else that you consider in addition to that statement?

A. That there was a history of backups in that line in front of the Acosta residence.

Q. A history of backups caused this backup?

A. Well, and no corrective actions beyond dealing with the backup at that exact moment in time. And again, you know, they're detailed in this report.

Q. Okay. Were any of those items that you've articulated, the grease, the sizing and design of the sewer line including the diameter, the presence of the downstream connections, the lack of jetting, the capacity of the system, the history of backups, were any of these factors sufficient in and of themselves? That is to say, independent of the other factors, to cause the backup?

A. I'm not sure that I could state it that way.

Q. How would you state it?

A. That there was a change in the system in the last couple years that made a dramatic difference between the likelihood that things were going to back up.

Q. What change in the system was that?

A. The lack of regular maintenance or regular jetting.

Q. Okay. When was the last time this line was jetted prior to the backup occurring?

A. As I understood it, it was as needed when backup

occurred as opposed to doing it regularly roughly twice a year, three times a year as had -- typically had been done up until several years prior.

Q. What's your source for that testimony?

A. Mr. Trujillo.

Q. Anything else?

A. Reviewing the maintenance records and just simply seeing that there was no jetting.

CP 259–62.

Q. Are there other specific aspects of Mabton's role that in your opinion led to this backup that fell below the standard of care?

A. In addition to all of the other components we've already talked about?

Q. Well, that's what I want to know. I mean, you've talked about a number of components. Those, I think we -- I think your testimony was those contributed to the backup. I'm trying to understand, now, something slightly different. What are the specific aspects that caused the backup for which Mabton is responsible and for which Mabton fell below the standard of care? If they're the same, then you can say they're the same, but I just need to understand that

A. They're the same.

CP 269–70.

Based on the foregoing case law and evidence, a reasonable person could find that the City of Mabton breached its duty of care, causing the sewage backup to occur, thereby causing the Acosta's damages. Accordingly, it was improper for the trial court to enter summary judgment in this case.

B. The Acostas provided sufficient summary judgment evidence in response to Mr. Peacock.

The City of Mabton, in its brief, places an emphasis on the time stamp of the Acosta's summary judgment evidence rather than the substance contained therein. While the deposition testimony of City employees and Ms. Evans as well as Ms. Evans's expert reports were produced before the affidavit of Mr. Peacock, it is incorrect to conclude therefrom that the Acostas did not meet their burden of proof on summary judgment. The timing of an affidavit or deposition does not dictate the success of a party in the burden shifting scheme of summary judgment. The Acostas sufficiently responded to the City of Mabton's summary judgment evidence, including the Declaration of Mr. Peacock, meeting their burden of proof.

Furthermore, "disputed opinion testimony, offered by qualified experts, cannot be resolved at summary judgment. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 174–75, 313 P.3d 408 (2013) (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 119–20, 11 P.3d 726 (2000)). As the foregoing sections on duty and breach illustrate and this section lays out, the Acostas (1) meaningfully responded to Mr. Peacock's declaration and (2) provided a distinct opinion by a qualified expert on all elements of

negligence. Therefore, summary judgment should not have been granted in this case and the trial court erred in doing so. *See id.*

1. The Acostas sufficiently responded to the City of Mabton's theory that a ball caused the sewer backup.

The Acostas provided factual testimony that sufficiently rebut opinions contained in Mr. Peacock's declaration. The City of Mabton, with the support of Mr. Peacock's declaration, alleges that a third party deposited a ball into the sewer system, which caused the backup that flooded the lower level of the Acosta's home. Furthermore, the City of Mabton argues that this third party's conduct was outside of its control. Ms. Evans and the former City of Mabton employees provided sufficient testimony rebutting the presence of the ball blocking the sewer line.

Ms. Evans testified during her deposition that this ball could not have entered the sewer system through the toilet or other plumbing fixture or through the storm water system. CP 202. Additionally, Ms. Evans stated that it is unlikely a ball entered the sewer system through a manhole because manhole covers typically weigh between 90 and 150 pounds. CP 202. It would be very difficult for a third party to deposit a ball into a manhole because of the challenge in lifting and removing the heavy manhole cover.

Furthermore, Ms. Evans testified that "an inflated ball...once it gets

to a manhole,...it's going to pop up to the surface, and...when you're talking an 8-inch line, worst case, a 10-inch line, it does not have the wherewithal to be able to submerge itself to be able to then head back downstream." CP 266. Ms. Evans based this opinion on physics—not an improper credibility determination as the City of Mabton suggests in its brief: "a plastic ball filled with air is the physics of air and -- versus water in terms of it's not going to be able to sink itself underneath even if you've got some turbulence pushing to be able to get it to drop the additional four inches to fit relatively tightly through the sewage line." CP 266. Ms. Evans testified that the ball would "have to be very full of water relative to air in the system to be able to have the turbulence be enough to sink it." CP 267. She ruled this out as a possibility because of the description of the ball by Mayor Martinez as being mostly inflated. CP 267.

Moreover, Mr. Trujillo and Mr. Mendoza testified during their depositions that they did not see a ball physically blocking the sewer line on January 12, 2015. CP 303–04, 377–78. Mr. Trujillo stated that the only time he has seen a ball in the line was at a different time and a different part of town from the January 12, 2015 backup. CP 303–04.

Additionally, Mr. Mendoza testified during his deposition about the most comprehensive, contemporaneous report outlining the January 12, 2015 sewer backup, and how this report does not document a ball blocking

the sewer line. CP 374–75. Mr. Mendoza stated that the ball probably would have been documented in this report if it has been the cause of the backup on January 12, 2015. CP 374–75.

Moreover, Mr. Mendoza's factual testimony contradicts Mr. Peacock's opinion regarding the ball. First, Mr. Peacock states that the "accumulation of a significant amount of wastewater behind the blockage in a **relatively short amount of time** is also consistent with a blockage caused by the introduction of a ball to the system." CP 110 (emphasis added). There is no basis for Mr. Peacock's opinion that the accumulation of wastewater and debris occurred in a short amount of time. The only testimony from witnesses in this case about the length of time of the backup comes from Mr. Mendoza. According to Mr. Mendoza, "[a]s far as backed up in gallons…this [backup was] probably one of the bigger ones." CP 351. Several manholes near the Acosta's home were filled with sewage. CP 351. These facts signaled to Mr. Mendoza that the backup had "been going on a while." CP 351.

Second, Mr. Peacock states that "[w]ithout the introduction of a foreign object into the system, here a ball, the type of blockage described by the Acostas and City employees would not have occurred." CP 110. However, during his deposition, Mr. Mendoza described prior similar sewer backups that were not caused by the introduction of a foreign

object, but instead by grease:

> Q. Had you worked a backup situation for the City of Mabton that took as long to clear as this one did?
> A. I believe so.
> Q. All right. Is there another backup in particular that you're thinking of that took a long time other than this one?
> A. There's been a couple.
> Q. All right. Well, tell me the circumstances of those. Where were those located and what was the plug in those situations?
> A. It's all -- it's mostly always grease.

CP 352.

Pursuant to the foregoing, a genuine issue of material fact exists as to whether a ball was in the sewer line on January 12, 2015, and whether this ball caused the sewer to backup, flooding the lower level Acosta's home.

2. Mr. Peacock incorrectly criticizes Ms. Evans's opinion.

The City of Mabton claims in its brief that the Declaration of Mr. Peacock reveals certain analytical gaps in Ms. Evans's opinion. Yet, Mr. Peacock criticizes Ms. Evans for opinions that she does not make. For example, Mr. Peacock criticizes Ms. Evans for the idea that the City of Mabton should have had 20-inch sewer lines—an opinion that Ms. Evans never made. During the portion of Ms. Evans's deposition about the size of the sewer line, Ms. Evans was simply providing an example of how the size of the line played a role in the backup—*not* a suggestion that the City

of Mabton should have a 20-inch sewer line. CP 258–59. Here, Mr. Peacock is twisting the deposition testimony of Ms. Evans, not revealing analytical gaps in her opinion.

C. The Trial Court correctly denied the City of Mabton's Motion to Strike.

The trial court correctly denied the City of Mabton's Motion to Strike the Deposition and Expert Reports of Susan Evans. First, both of Susan Evans's reports are signed by Ms. Evans and are attached as Exhibit 2 to the sworn, certified copy of the deposition of Susan Evans. It is these excerpts to Exhibit 2 of Ms. Evans's deposition transcript that are attached to the Declaration of Maury A. Kroontje and properly relied on by Acostas in their summary judgment opposition motion. Second, Susan Evans is qualified as an expert in this case. As such, the Acostas should be able to rely on Ms. Evans's reports and deposition testimony.

1. Susan Evans's expert reports are properly attached to and relied upon in the Acosta's Opposition to the City of Mabton's Motion for Summary Judgment.

Pursuant to CR 56(e), "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). Furthermore, the rule goes on to state that "[s]worn or certified copies of all papers or parts

thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." CR 56(e).

"Courts do not always demand strict compliance with the express requirements of CR 56(e), due to the potentially drastic consequences of a summary judgment motion, particularly with respect to the nonmoving party." *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 326–27, 300 P.3d 431 (2013) (citing *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967)). While CR 56(e) does not distinguish between affidavits of the moving and nonmoving party, "it is almost the universal practice-because of the drastic potentials of the motion-to scrutinize with care and particularity the affidavits of the moving party while indulging in some leniency with respect to the affidavits presented by the opposing party." *Meadows*, 71 Wn.2d at 879, 881 (stating that while respondents contend that the affidavits are deficient because they do not have appended to them certified or sworn copies of the transcripts referred to in the body of the affidavits, this deficiency could have been corrected).

The expert reports authored by Ms. Evans are exhibits to her sworn and certified deposition. CR 56(e) expressly authorizes affidavits to be

supplemented by depositions. CR 56(e). During her deposition, while under oath, Ms. Evans identifies her reports in exhibit 2. CP 237–38. She states that her opinions are contained in these reports attached as exhibit 2. CP 254. Furthermore, Mr. Harper had the opportunity to question Ms. Evans about her reports while Ms. Evans was under oath.

2. *Susan Evans is qualified as an expert.*

Ms. Evans, as a civil engineer, is qualified as an expert and her testimony on remediation as well as the cause of the sewer backup and the Acosta's damages will be helpful to the trier of fact. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, or training, or education, may testify thereto in the form of an opinion or otherwise." *Acord v. Pettit*, 174 Wn. App. 95, 111, 302 P.3d 1265 (2013) (citing ER 702). Application of ER 702 raises two questions: (1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact. *Id.* (citing *State v. McPherson,* 111 Wn. App. 747, 761, 46 P.3d 284 (2002)). Trial courts are afforded wide discretion in applying this test. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388, 391 (2014) (citing *In re Marriage of Katare,* 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 889 (2013)).

An opinion is admissible only if it has a rational basis, which is the same as to say that the opinion must be based on *knowledge. State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (1999). The knowledge may be personal, or it may be scientific, technical, or specialized. *Id.* "'Practical experience is sufficient to qualify a witness as an expert.'" *Acord*, 174 Wn. App. at 111 (internal citations omitted).

"Evidence is helpful if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury." *State v. King Cty. Dist. Court W. Div.*, 175 Wn. App. 630, 638, 307 P.3d 765 (2013) (citing *State v. Thomas,* 123 Wn. App. 771, 778, 98 P.3d 1258 (2004)). "Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases." *Miller v. Likins,* 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

First, Ms. Evans is qualified as an expert because she has the requisite education, knowledge, and experience. Ms. Evans received her Structural Engineering degree from the University of Wisconsin-Milwaukee in 1973. CP 206, 225. Ms. Evans has done consulting work related to sewers; specifically, she has examined how they are sized, whether their slopes are proper, and whether there are certain things blocking or causing issues in the sewer lines. CP 222. She has also worked on between fifty to one-hundred sewer remediation cases and has

25 years of experience in industrial hygiene, environmental health, and safety evaluations. CP 206, 255. Furthermore, Ms. Evans consulted with another partner, Mark Nordstrom, on this case. CP 226. Mr. Nordstrom has a lot of experience in sewer work. *Id.* Mr. Nordstrom peer reviewed Ms. Evans's second report; Mr. Nordstrom agreed with Ms. Evans's findings and signed the report along with Ms. Evans. *Id.*

Second, Ms. Evans's opinions and testimony will be helpful to the jury because the design, function, and complexities of a municipal sewer system, and sewer remediation work is beyond the knowledge of a lay person.

II. CONCLUSION

In this case, the trial court erred in granting the City of Mabton's Motion for Summary Judgment. The foregoing case law and evidence illustrates that genuine issues of material fact exist, preventing the

///

///

///

///

///

///

///

summary adjudication of this case. As a result, the order granting the City of Mabton's Motion for Summary Judgment should be reversed.

DATED this 19th day of September, 2017.

Respectfully submitted,

KROONTJE LAW OFFICE, PLLC

Maury A. Kroontje

Maury Kroontje, WSBA No. 22958
Kaya R. Lurie, WSBA No. 51419
1411 Fourth Avenue, Suite 1330
Seattle, WA 98101
TEL: (206) 624-6212
Fax: (206) 824-6816
Email: maury@kroontje.net
Email: kaya@kroontje.net
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Maury A. Kroontje, declare as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the above captioned case.

2. I am the attorney of record for Appellants Norma and Gilbert Acosta. My business address is Kroontje Law Office, PLLC, 1411 Fourth Avenue, Suite 1330, Seattle, WA 98101.

3. On September 19, 2017, I caused the original **Reply Brief of Appellants** to be filed in the Court of Appeals – Division Three and a true copy of the same to be served on the following party via the method(s) indicated:

Attorney for Respondent
Kenneth W. Harper
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902

(X) Via U.S. Priority Mail
( ) Via Facsimile:
( ) Via ABC Legal Messenger
(X) Via E-Service (Washington State Appellate Courts' Portal)
( ) Via Hand Delivery
( ) Via Email: kharper@mjbe.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of Sept., 2017.

Maury A. Kroontje, WSBA No. 22958

KROONTJE LAW OFFICE PLLC

September 19, 2017 - 4:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35159-9
Appellate Court Case Title:	Norma Acosta, et al v City of Mabton
Superior Court Case Number:	16-2-00414-7

The following documents have been uploaded:

- 351599_Briefs_20170919162746D3781368_9440.pdf
  This File Contains:
  Briefs - Petitioners Reply
  The Original File Name was Reply Brief of Appellants.PDF

A copy of the uploaded files will be sent to:

- julie@mjbe.com
- kharper@mjbe.com

Comments:

Sender Name: Maury Kroontje - Email: maury@kroontje.net
Address:
1411 4TH AVE STE 1330
SEATTLE, WA, 98101-2250
Phone: 206-624-6212

Note: The Filing Id is 20170919162746D3781368